

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054**

In the Matter of)	
)	
Amendment of the Schedule)	
of Application Fees Set Forth)	GEN Docket No. 86-285
In Sections 1.1102 through 1.1109)	
of the Commission's Rules)	

To: The Commission

PETITION FOR RECONSIDERATION

Williston Community Broadcasting Corporation, by and through its attorneys, submits this Petition for Reconsideration of the Second Order in the above-captioned docket, released June 20, 2011, pursuant to Section 1.429 of the Commission's Rules.¹

The Second Order violates the Administrative Procedures Act ("APA"), 5 U.S.C. § 553(d), the Regulatory Flexibility Act, 5 U.S.C. § 604 ("RFA"), and the Congressional Review Act, 5 U.S.C. § 801 ("CRA"). Accordingly, a corrected order addressing these deficiencies is required before the rule change can take effect.

I. Background

In the Second Order, the Commission amended 47 C.F.R. § 1.2107(c). Previously, this rule provided that "[n]otwithstanding any other provision in Title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications." The new rule

¹ Petitioner has standing, as it was a high bidder in Auction 91 and was required to pay the long-form application filing fee. The basis of this petition arose upon publication of the Second Order in the Federal Register, as only then did the APA, RFA, and CRA violations become apparent.

provides as follows: “Except as otherwise provided in § 1.1104, high bidders need not submit an application filing fee with their long-form applications.”

The Commission in the Second Order disregarded the APA requirement that a rule change take effect 30 days from the date of publication in the Federal Register, and instead ordered that the new rule become effective “the day of publication in the Federal Register.”² Furthermore, the Commission did not prepare either an initial or final regulatory flexibility analysis under the RFA in this proceeding, due to its view that the proposed rule change “will not have a significant economic impact on a substantial number of small entities or impose significant costs on parties to Commission proceedings.”³ Finally, the Commission did not report to Congress as required by the CRA which the Commission justified on the basis that it considered the new rule as a “rule of agency procedure that does not substantially affect the rights of obligations of non-agency parties.”⁴ Each of these actions or omissions violates statutory law, as set out below.

II. The Administrative Procedures Act 30-Day Requirement

By making the effective date of the new rule the date of publication in the Federal Register, the Commission violated 5 U.S.C. § 553(d) and 47 C.F.R. § 1.427(a), which require that a rule change must take effect not less than 30 days from the date of publication. Congress has provided only three exceptions to this statutory 30 day

² Second Order ¶ 4.

³ *Amendment of the Schedule of Application Fees Set Forth in Sections 1.1102 through 1.1109 of the Commission's Rules*, Order and Notice of Proposed Rulemaking, 26 FCC Rcd 2511, 2512 ¶ 3 (2011).

⁴ Second Order ¶ 3.

mandate.⁵ First, an agency may recognize an exception a new rule for "good cause" so long as such good cause is published with the rule; but no such finding was made here. Second, an exception may be recognized for a new rule which "grants or recognizes an exemption or relieves a restriction"; clearly that is not the case here, because no exemption or restriction is at issue. Finally, there is an exception for "interpretive rules and statements of policy." This exception is inapplicable as well.

The Supreme Court has held that if an agency adopts "a new position *inconsistent with any . . . existing regulations*", or effects "a substantive change in the regulation," that action is not interpretive and APA procedural rules apply.⁶ Here, the revision replaces the sentence

Notwithstanding any other provision of in Title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications
with

Except as otherwise provided in Section 1.1104 of the rules, high bidders need not submit an additional application fee with their long-form applications.

This change not only substantively alters the meaning of the rule, it also renders the prior rule a complete nullity for media applicants.

Therefore, the new provision is unquestionably substantive and triggers the requirements of the APA. The Commission has acknowledged as much by complying with most other aspects of the APA in this proceeding. We note that if the Commission *had* complied with the 30-day requirement, the new rule would not have been in effect for the last two days of the long-form filing (and payment) period for Auction 91. A

⁵ 5 U.S.C. § 553(d)(1)-(3).

⁶ *Shalala v. Guernsey Mem'l Hosp.*, 514 US 87, 100 (1995) (emphasis added); see also *U.S. Telecom Association v. FCC*, 400 F.3d 29 (2005).

number of earlier high bidders have applied for fee refunds on the basis of Section 1.2107. The June 28 effective date excludes a number of Auction 91 applicants from making similar requests, thus violating the basic fairness principle of treating similar parties similarly.⁷

III. The Regulatory Flexibility Act Analysis Requirement

As noted above, the Commission did not prepare either an initial or final regulatory flexibility analysis under the RFA in this proceeding, purportedly because the proposed rule change “will not have a significant economic impact on a substantial number of small entities or impose significant costs on parties to Commission proceedings.”⁸ Although Section 605 of the RFA permits the Chairman to certify that the rule will not have such an impact, this certification must be published, along with its factual basis. Because no such certification was published, this procedure was not followed and the Second Order does not comply with the RFA on its face.

More fundamentally, the assertion that the proposed rule change “will not have a significant economic impact on a substantial number of small entities or impose significant costs on parties to Commission proceedings” is patently incorrect. Section 1.2107 previously expressly stated that no high bidder was required to pay a long form application fee. Now Section 1.2107 says that media applicants *will have to pay* such a fee. The media long-form filing fees are indisputably a “significant cost” on parties to Commission proceedings. For example, the most-recently published filing fee for

⁷ *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

⁸ *Amendment of the Schedule of Application Fees Set Forth in Sections 1.1102 through 1.1109 of the Commission’s Rules*, Order and Notice of Proposed Rulemaking, 26 FCC Rcd 2511, 2512 ¶ 3 (2011).

commercial FM Radio Stations was \$3,485.00. And small entities are clearly affected by this change: many broadcasters, if not the majority, are small businesses.

Inexplicably, the agency acknowledged that it has to comply with the RFA but then did not do so. The NPRM as printed in the Federal Register ordered that the Consumer and Governmental Affairs Bureau send a copy of the NPRM, "including the Initial Regulatory Flexibility Analysis," to the Chief Counsel for Advocacy of the U.S. Small Business Administration.⁹ Thus, although the Commission refers to the required procedures, it did not follow them.

IV. Congressional Review Act Reporting Requirement

When it promulgates a new rule, an agency must submit to each House of the Congress a report with details of the rule, including details on how the agency complied with the Regulatory Flexibility Act (see above). The rule cannot take effect until the report is submitted.¹⁰

The Commission did not comply with the statute in promulgating the Second Order. Although it asserts that the Second Order is exempt under 5 U.S.C. 804(3)(C),¹¹ which provides an exemption for "any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties", the new rule clearly does not fall within that section. As we discuss above, a rule of procedure which imposes a several thousand dollar fee upon a regulated entity plainly *does* affect non-agency parties; to claim otherwise is patently absurd.

⁹ 76 FR 18138 ¶ 8.

¹⁰ 5 U.S.C. § 801.

¹¹ Second Order ¶ 3.

Because of the failure to comply with the statutory requirements as described above, the Second Order cannot take effect. The Commission must reissue the order with a regulatory analysis, report to Congress, and new effective date.

Respectfully Submitted,

By: 
M. Scott Johnson


Christine Goepfert
Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street 11th Floor
Arlington, VA 22043
(703) 812-0400
*Counsel to Williston Community
Broadcasting*

July 28, 2011